

COURT OF APPEALS
DIVISION TWO

¶1 After a jury trial, appellant Shane McMillin was convicted of theft of a means of transportation, third-degree burglary, fleeing from a law enforcement vehicle, and criminal damage. The trial court imposed concurrent, presumptive terms of imprisonment on all four counts, the longest of which was 11.25 years. On appeal, McMillin challenges only his

sentence of 3.75 years on his conviction for criminal damage. He contends he must be resentenced on that count because the sentence imposed exceeds the term statutorily allowed for a class two misdemeanor. The state concedes McMillin was convicted of a class two misdemeanor and sentenced in error. We agree.

¶2 “A sentence of imprisonment for a misdemeanor shall be for a definite term to be served other than a place within custody of the state department of corrections. The court shall fix the term of imprisonment within . . . maximum limitations” for each class of misdemeanor, the limitation for a class two being set at a maximum of four months. A.R.S. § 13-707(A)(2). The trial court applied the wrong statutory sentencing provision. Consequently, it imposed an illegal sentence on McMillin’s conviction for criminal damage, one which far exceeded the maximum penalty otherwise available. We find the error both fundamental and prejudicial. *See State v. Munninger*, 213 Ariz. 393, ¶ 11, 142 P.3d 701, 705 (App. 2006) (imposition of an illegal sentence generally constitutes fundamental error).

¶3 For these reasons, although we affirm McMillin’s conviction for criminal damage, we vacate the sentence imposed on that count and remand for further proceedings consistent with this decision. McMillin’s remaining convictions and sentences are affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge